IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
July 19, 2006 Session

SEVIER COUNTY BANK v. PAYMENTECH MERCHANT SERVICES, INC., ET AL.

Appeal from the Chancery Court for Sevier County
No. 02-6-304 Jerry Scott, Senior Judge, by Designation

No. E2005-02420-COA-R3-CV - FILED AUGUST 23, 2006

Sevier County Bank ("the Bank") entered into a referral agreement with First USA Merchant Services, Inc. ("First USA") which provided that the Bank, for a fee, would refer its merchant customers to First USA for credit card processing services. The Bank filed this lawsuit over 7½ years later against First USA's successor, Paymentech LP, and others. The Bank claimed that Paymentech breached the referral agreement and committed various tortious acts when it began diverting the Bank's customers to another bank located in Sevier County. The referral agreement contained a forum selection clause stating that any claims relating to or arising from the agreement would be brought in Dallas, Texas. All the defendants filed motions to dismiss pursuant to the forum selection clause. The Trial Court determined that the forum selection clause was valid and the lawsuit should have been filed in Dallas, Texas. Accordingly, the Trial Court dismissed the lawsuit without prejudice. The Bank appeals, and we affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed; Case Remanded

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and SHARON G. LEE, J., joined.

Raymond E. Lacy and C. Allen Ragle, Knoxville, Tennessee, for the Appellant Sevier County Bank.

Andrew L. Colocotronis and Ashley Meredith Lowe, Knoxville, Tennessee, for the Appellees Paymentech, L.P. and Paymentech, Inc.

Scott D. Hall, Sevierville, Tennessee, for the Appellees Katherine Oakes and Mary Jane Ownby.

OPINION

Background

The primary issue on appeal is whether the Trial Court correctly dismissed the Bank's complaint without prejudice pursuant to a forum selection clause. On October 1, 1994, the Bank and First USA entered into a Referral Agreement (the "Agreement") which provided for the referral of the Bank's merchant customers to First USA for credit card processing services. The Bank, in turn, would receive a fee for referring its merchant customers to First USA. The Bank claimed that during negotiations of the Agreement, it was represented to the Bank that, among other things: (1) the Bank would be the sole and exclusive bank in Sevier County which could make referrals to First USA; (2) First USA would process credit cards for the Bank's merchants only when they were referred from the Bank and for which the Bank would receive the agreed upon fee; and (3) First USA would not directly solicit the business of any merchant referred by the Bank.

In June of 2002, the Bank filed this lawsuit against Paymentech Merchant Services, Inc., formerly known as First USA. The Bank later amended its complaint. The Bank also sued various other Paymentech entities including Paymentech, Inc., Paymentech, LP, and Paymentech, LLC (collectively referred to as "Paymentech" unless stated otherwise). The Bank also sued Prism Processing Services, Inc., and two Paymentech employees, Katherine Oakes ("Oakes") and Mary Jane Ownby ("Ownby"). In the complaint, as later amended, the Bank sued Paymentech for breach of contract, breach of implied contract, unjust enrichment, misrepresentation, interference with business relationships, and inducement of breach of contract. The Bank sued Oakes for misrepresentation and fraud, and the Bank sued both Oakes and Ownby for interference with business relations and inducement of breach of contract.

In its amended complaint, the Bank claimed that Paymentech contacted the Bank's merchant customers and advised them to enter into a new credit and processing agreement with Paymentech, which had the effect of eliminating the compensation due the Bank under the Agreement. The Bank claimed that Paymentech ceased making payments pursuant to the Agreement in late 2000 or early 2001. The Bank also claimed that Oakes, on behalf of Paymentech, mailed letters which contained false and disparaging remarks about the Bank and which interfered with the Bank's current and prospective business relationships. The Bank also asserted that Paymentech forged the signature of the Bank's Vice President to various guaranties wherein the Bank supposedly guaranteed payments on the credit cards of various customers. Finally, the Bank claimed that Paymentech entered into a similar referral agreement with another bank located in Sevier County and began diverting the Bank's merchant customers to that other bank.

As pertinent to this appeal, the Agreement provides:

> A. Governing Law: Place of Performance. This Agreement shall be construed in accordance with the laws of the State of Texas. This Agreement has been accepted in and shall be

> performable in Dallas, Dallas County, Texas. Any action, proceeding or litigation relating to or arising from this Agreement shall be brought in Dallas County, Texas.
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> * * *
>
> F. Assignment. Neither party hereto may assign this Agreement without the prior written consent of the other party, which consent shall not be unreasonable (sic) withheld.

Paymentech LP, Oakes, and Ownby filed motions to dismiss, claiming the forum selection clause in the Agreement should be given effect and the case dismissed without prejudice to the refiling of the complaint in Dallas County, Texas. Paymentech Inc., also filed a motion to dismiss, claiming it was not a party to the Agreement and had no relationship with the Bank. Alternatively, Paymentech Inc., asserted that the lawsuit should be dismissed based on the forum selection clause.

In response to the motions to dismiss, the Bank filed the affidavit of its President, Ross Barnes Summitt, II ("Summitt"). According to Summitt, based on the number of witnesses located in Tennessee, it would cost the Bank tens of thousands of dollars to transport the witnesses to Dallas for a trial and provide their hotel accommodations, etc. Summitt indicated the Bank would call as witnesses various merchants which had switched credit card processing agreements as well as witnesses from the competitor bank.

Summitt acknowledged in his affidavit that the Agreement was entered into in October of 1994, and the last payment pursuant to the Agreement was received over six years later, in December of 2000. Summitt added that the Agreement supposedly was terminated in June of 2001. Notwithstanding the significant lapse of time between the signing of the Agreement and when the problems started, Summitt nevertheless stated that he now believes that many of the representations made to the Bank at the time the Agreement was entered into were false. Summitt added that had he known First USA/Paymentech had no intention of keeping its promises, he would not have agreed to the forum selection clause.

Oakes also filed an affidavit. Oakes stated that the negotiations for the Agreement took place between the Bank in Tennessee and employees of First USA located in Dallas, Texas. After the Agreement was executed, all decisions by First USA/Paymentech regarding the Agreement would have been made in Dallas, Texas. Oakes added:

> All Payments made by Paymentech to Sevier County Bank would have originated in Dallas Texas.… The majority of documents related to the Referral Agreement between Paymentech and Sevier County Bank are located in Dallas, Texas. The amount of documents relating to the Referral Agreement held by Paymentech employees in

> Sevier County is extremely limited.… All original individual Merchant Services Agreements executed between Paymentech and individual merchants referred to it by Sevier County Bank are located in Dallas, Texas.

Following a hearing on the motions to dismiss and in reliance on the Agreement's forum selection clause, the Trial Court entered a detailed order granting the motions to dismiss, without prejudice. The Trial Court began by citing our Supreme Court's opinion in *Dyersburg Machine Works, Inc. v. Rentenbach Engineering Co.*, 650 S.W.2d 378 (Tenn. 1983). In *Dyersburg*, the Court determined that a forum selection clause should be enforced unless the party opposing its enforcement demonstrates that it would be unfair or inequitable to do so. *Id*. at 380. The Court also set forth four factors to be considered in determining whether to enforce a forum selection clause. *Id.* After reviewing these factors, the Trial Court concluded that the forum selection clause should be enforced. According to the Trial Court:

> In this case the Plaintiff is a bank. One can hardly argue that a bank is not a sophisticated business entity. There has been no allegation of fraud, duress, misrepresentation, abuse of economic power, overreaching, or unconscionable actions by any Defendant in the formation of the contract.
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> While it has been argued that the Plaintiff cannot secure effective relief in Texas due to the fact that the two individual Defendants are Tennessee residents, the allegations against the individual Defendants are based on their actions on behalf of the corporate Defendants. Therefore, their acts are imputed to the corporate Defendants by respondeat superior. Any judgment against an individual Defendant in the Texas court could be enforced by levy or garnishment in Tennessee, under the full faith and credit clause of the United States Constitution. The State of Texas would be substantially less convenient for the Plaintiff and more convenient for the Defendant Paymentech, since it has an office in Dallas, Texas.…
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> [I]t appears that this was an arm's length commercial transaction between two business entities represented by sophisticated officers, who had access to competent legal counsel, and which entered into the [Agreement] for their mutual benefit. The inclusion of a forum selection clause is a common practice in many contractual relationships and the inclusion or exclusion of the clause could have been negotiated had the parties chosen to do so.
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> The Court finds that the forum selection clause is a reasonable provision and that it is enforceable under both Tennessee law (where

> this suit is presently pending) and under Texas law (which is the proper forum under the forum selection clause). The Court also notes that Ms. Oakes and Ms. Ownby have specifically agreed to submit themselves to the jurisdiction of the Texas Court. Hence, any inconvenience for those Defendants is not a factor in this litigation. (emphasis in original).

The Bank appeals raising various issues. The Bank's primary issue is its claim that the forum selection clause should not have been enforced pursuant to applicable Tennessee law. The Bank also claims the forum selection clause should not have been enforced because the Agreement was entered into fraudulently. Finally, the Bank claims that the provision in the Agreement requiring assignments to be agreed to and in writing bars any or all of the Paymentech entities from asserting the forum selection clause as a basis for dismissal of the complaint.

Discussion

We begin with our Supreme Court's decision in *Dyersburg Machine Works, Inc. v. Rentenbach Engineering Co.*, 650 S.W.2d 378 (Tenn. 1983). The *Dyersburg* Court had the following to say about the enforcement of forum selection clauses:

> [T]he more recent decisions hold that the validity or invalidity of such forum selection clauses depends upon whether they are fair and reasonable in light of all the surrounding circumstances attending their origin and application. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972); *Krenger v. Pennsylvania R. Co.*, 174 F.2d 556 (2d Cir. 1949); *Muller & Co. v. Swedish Am. Line Limited*, 224 F.2d 806 (2d Cir. 1955), 56 A.L.R.2d 295; Gilbert, "Choice of Forum Clauses and International and Interstate Contracts," 65 Ky. Law Journal 1 (1976).
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> *The Model Choice of Forum Act*[1] provides that an unselected court must give effect to the choice of the parties and refuse to entertain the action unless (1) the plaintiff cannot secure effective relief in the other state, for reasons other than delay in bringing the action; (2) or the other state would be a substantially less convenient place for the trial of the action than this state; (3) or the agreement as to the place of the action was obtained by misrepresentation, duress, abuse of economic power, or other unconscionable means; (4) or it

[1] Not adopted in Tennessee.

would for some other reason be unfair or unreasonable to enforce the agreement.[2]

Section 80 of the *Restatement (2d) of Conflict of Laws* (1971), provides:

> "The parties' agreement as to the place of the action cannot oust a state of judicial jurisdiction, but such an agreement will be given effect unless it is unfair or unreasonable."

Courts which recognize the validity of forum selection clauses generally, nevertheless, have refused to enforce them against third parties who did not agree to the contract containing such clause and are not parties to the agreement. *Matthiessen v. National Trailer Convoy, Inc.*, 294 F. Supp. 1132 (D. Minn. 1968); *Zapp v. Davidson*, 21 Tex. Civ. App. 566, 54 S.W. 366 (1899); *Shows v. Jackson*, 215 Ala. 256, 110 So. 273 (1926).

We conclude that the courts of this state should give consideration to the above mentioned factors and any others which bear upon the fundamental fairness of enforcing such a forum selection clause, and should enforce such a clause unless the party opposing enforcement demonstrates that it would be unfair and inequitable to do so.

Dyersburg, 650 S.W.2d at 380 (footnotes in the original).

The first issue we will address is the Bank's argument that the forum selection clause does not apply because the Agreement never was properly assigned in writing by First USA to any of the Paymentech entities. As previously set forth, the Agreement states that neither party "may assign this Agreement without the prior written consent of the other party, which consent shall not be unreasonable (sic) withheld." It seems the Bank argues that the Paymentech entities are successors of First USA for purposes of being held liable for breaching the Agreement, but Paymentech is not a party to the Agreement with regard to the forum selection clause because the Bank never specifically agreed to any assignment. From the record before us, it does not appear that there was a formal assignment of the Agreement, but rather that one or more of the Paymentech entities are First USA's successor to the Agreement simply as the result of mergers and/or name changes.[3]

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[2] *The Model Choice of Forum Act*, 1968.

[3] We express no opinion on which of the several Paymentech entities sued under the Agreement are properly bound by the Agreement. That is an issue better left to the Texas courts applying Texas law.

In *Tennsonita (Memphis), Inc. v. Cucos, Inc.*, 1991 WL 66993 (Tenn. Ct. App. May 2, 1991), the plaintiffs argued that a forum selection clause was not applicable in that case because the lawsuit did not arise from development or license agreements signed by the parties. Both of those agreements contained identical forum selection clauses. *Id.* at *2. While this Court acknowledged that a subsequent takeover agreement which did not contain a forum selection clause was a separate contract, we nevertheless concluded that the takeover agreement arose out of the development and license agreements which did contain the forum selection clause. Therefore, the forum selection clauses were applicable. We also pointed out that when evaluating a forum selection clause, a court should "look to the basis for which damages are sought to determine the type of action being brought …." 1991 WL 66993, at *2 (citing *Bland v. Smith*, 277 S.W.2d 377 (Tenn. 1955)).

In the present case, the gravamen of the Bank's complaint is a breach of the Agreement. The Bank clearly alleges a breach of the Agreement and that there were several misrepresentations made in the negotiation process leading up to the signing of the Agreement. At the very least, all the Bank's claims relate to or arise from the Agreement. Accordingly, we decline to hold that the forum selection clause contained within the Agreement is not applicable to the Bank's claims in this case. The Agreement either does or does not apply. The Bank cannot be heard to claim that only certain portions of the Agreement which are beneficial to its case apply, but all others do not.

Returning to the various factors set forth in *Dyersburg*, the Bank has not established that a Texas court cannot afford effective relief. The Bank claims that a Texas court cannot exercise jurisdiction over the individual defendants, but this position is belied by the fact that the two individual defendants have unequivocally agreed to submit themselves to the jurisdiction of the Texas courts. In addition, the State of Texas has a reasonable relation to this litigation. Paymentech L.P. is a limited partnership with its principal place of business in Dallas, Texas. Many of the pertinent documents are maintained by Paymentech at its Dallas facility. Several witnesses are located in Dallas., etc. Suffice it to say, there are ample connections to Texas for the courts of that state to exercise jurisdiction over these proceedings. Because the individual defendants have agreed to submit themselves to the jurisdiction of the Texas courts, there is no impediment to a Texas court exercising personal jurisdiction over all of the parties.

The second factor in *Dyersburg*, and the one most heavily relied upon by the Bank, is whether "the other state would be a substantially less convenient place for the trial of the action than this state." *Dyersburg*, 650 S.W.2d at 380. In *Safeco Ins. Co. of America v. Shaver*, No. 01A01-9301-CH-00005, 1994 WL 481402 (Tenn. Ct. App. Sept. 7, 1994), *no appl. perm. appeal filed*, we observed:

> Enforcing a forum selection clause would be unreasonable in circumstances where forcing the party to proceed in the selected forum would seriously impede its ability to fully and fairly pursue or defend the action. *Seattle-First Nat'l Bank v. Manges*, 900 F.2d 795, 799 (5th Cir. 1990); *General Elec. Co. v. Siempelkamp GmbH & Co.*,

> 809 F. Supp. 1306, 1312 (S.D. Ohio 1993); *Pennsylvania House, Inc. v. Barrett*, 760 F. Supp. 439, 444 (M.D. Pa. 1991). A party resisting a forum selection clause *must show more than* inconvenience or annoyance such as *increased litigation expenses*. *Carnival Cruise Lines, Inc. v. Stute*, 499 U.S. 585, 594-95, 111 S.Ct. 1522, 1527-28 (1991); *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. at 17-18; 92 S.Ct. at 1917; *Interamerican Trade Corp. v. Companhia Fabricadora de Pecas*, 973 F.2d 487, 489-90 (6th Cir. 1992).
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> Mr. Shaver's argument contains two significant flaws. First, the record contains no evidence concerning the expenses he expected to incur in defending Safeco's suit in the State of Washington or the difference between these expenses and the expenses he would have incurred defending the suit in Tennessee. Second, the fairness of a forum selection clause depends upon the facts and circumstances surrounding their origin and operation. *Dyersburg Mach. Works, Inc. v. Rentenbach Eng'g Co.*, 650 S.W.2d at 380. Parties challenging a forum selection clause cannot rely on facts and circumstances that were present or reasonably foreseen when they signed the contract. *See Interamerican Trade Corp. v. Companhia Fabricadora de Pecas*, 973 F.2d at 489; *Calanea v. D & S Mfg. Co.*, 510 N.E.2d 21, 23 (Ill. App. Ct. 1982).

Shaver, 1994 WI 481402, at *4 (emphasis added).

The Bank claims it would be an unreasonable expense for it to transport and accommodate all of the potential Tennessee witnesses to a trial in Dallas, Texas. However, the Bank fails to explain how the need for having witnesses present at a trial in Dallas, Texas, could be anything other than something that was "reasonably foreseen when [the Bank] signed the contract." If sophisticated parties, which the Bank certainly is, agree that a court in Dallas, Texas, is to be the proper forum to resolve an alleged breach of an agreement, it necessarily follows that it was "reasonably foreseen" that if there was a breach of that agreement, then costs would be incurred in having non-Texas witnesses present at a trial in the selected forum. *See also Spell v. LaBelle*, No. W2003-00821-COA-R3-CV, 2004 WL 892534, at *4 (Tenn. Ct. App. Apr. 22, 2004)(enforcing a forum selection clause contained in an arbitration agreement and noting that "the Plaintiff, a businessman, knew that Chicago would be a 'substantially less convenient' place when they entered into the arbitration agreement with a Chicago business.").

It is also important to note that when evaluating the convenience of having a trial in one state versus another state, we must look to the convenience of all of the parties, not just the plaintiff(s) or the defendant(s). Along this line, in *Signal Capital Corp. v. Signal One, LLC*, No. E2000-00140-COA-R3-CV, 2000 WL 1281322 (Tenn. Ct. App. Sept. 7, 2000) *perm. app. denied Mar. 29, 2001*, we stated:

> The second exception [in *Dyersburg*] relates to the convenience of having a trial in the other state as compared to Tennessee. The other state must be a substantially less convenient place for the trial than Tennessee. The convenience is evaluated from the perspective of all the parties, not just the Plaintiffs. The Plaintiffs argue that many witnesses and all the business records of Signal Capital and Signal One LLC are located in Chattanooga, Tennessee. However, the NationsBanc's representatives involved in this action are located in Texas and North Carolina. All correspondence regarding the business activities between the parties was sent to North Carolina. Therefore, business records are located in North Carolina as well as Tennessee. The record contains no information regarding the difference in Plaintiffs' expenses for litigating in Tennessee compared to litigating in North Carolina. The Plaintiffs only argue that they may have to take "expensive depositions." There is no proof that these "expensive depositions" would not have occurred if the litigation was in Tennessee. The Plaintiffs have not shown a substantial inconvenience to all the parties.

Signal Capital Corp., 2000 WL 1281322, at *4. *See also Quist v. Empire Funding Corp.*, No. 98 C 8402, 1999 WL 982953 (N.D. Ill. Oct. 22, 1999)(stating that the "mere loss of live testimony by non-party witnesses ordinarily does not constitute such serious inconvenience so as to warrant setting aside a freely negotiated forum selection clause," and noting parenthetically that "in the event … witnesses are unable to travel to Texas for arbitration, such witnesses may be able to offer either taped or live video testimony.").

The third factor in *Dyersburg* is whether "the agreement *as to the place of the action* was obtained by misrepresentation, duress, abuse of economic power, or other unconscionable means." *Dyersburg*, 650 S.W.2d at 380 (emphasis added). There has been no evidence presented of any misrepresentation regarding the forum selection clause itself. Summitt did state in his affidavit that he now believes misrepresentations were made when the Agreement was entered into and that had he known First USA had no intention of keeping its promises, he would not have agreed to the forum selection clause. The alleged misrepresentations Summitt refers to surround First USA/Paymentech's obligations pursuant to the Agreement regarding the referral of merchant customers, etc. The alleged misrepresentations do not pertain to the forum selection clause itself. We again note the lapse of time between the time the Agreement was entered into and when problems under the Agreement arose. We would indeed be hard pressed to conclude there was sufficient evidence of a misrepresentation regarding the forum selection clause itself based on Summitt's conclusory statement in his affidavit to the effect that he now believes that when the Agreement was entered into, it was First USA's intent all along to breach that Agreement some six or more years later. *See Lamb v. Megaflight, Inc.*, 26 S.W.3d 627, 631 (Tenn. Ct. App. 2000)("Plaintiffs have failed to present any evidence indicating that the forum selection clause itself

was procured by fraud, misrepresentation, duress, or any other unconscionable means. Plaintiffs are skilled businessmen who are well aware of the effect of such a clause.").

After reviewing the factors set forth in *Dyersburg*, we conclude that the Trial Court did not err when it concluded that the forum selection clause contained within the Agreement is enforceable under Tennessee law. We do not believe the result would be any different under Texas law. In *Phoenix Network Technologies (Europe) Limited v. Neon Systems, Inc.*, 177 S.W.3d 605 (Tex. Ct. App. 2005) the Texas Court of Appeals observed that the Texas Supreme Court had recently adopted a U.S. Supreme Court holding that forum selection clauses were *prima facie* valid. The *Phoenix* Court also concluded that previous Texas Court of Appeals holdings which required a showing that the agreed upon forum also recognize the validity of forum selection clauses was no longer a valid requirement. According to *Phoenix*:

> [The] test that our state supreme court currently employs does not have this threshold requirement, instead providing that forum-selection clauses are *prima facie* valid and will be enforced unless the opponent makes a strong showing that the forum-selection clause should be set aside. *See In re AIU Ins. Co.*, 148 S.W.3d at 113-14 (citing *M/S Bremen*, 407 U.S. at 15, 92 S.Ct. at 1916); *In re Automated Collection Techs., Inc.*, 156 S.W.3d at 559. Therefore, under current Texas Supreme Court precedent, appellees did not need to establish that any jurisdiction within the U.K. recognized the validity of forum-selection clauses generally.

Phoenix, 177 S.W.3d at 618. *See also In re Automated Collection Technologies, Inc.*, 156 S.W.3d 557 (Tex. 2004)("In *In re AIU Ins. Co.*, [148 S.W.3d 109, 112 (Tex. 2004)], we held that enforcement of forum-selections clauses is mandatory unless the party opposing enforcement 'clearly show[s] that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching.'"). For the same reasons set forth when discussing Tennessee law, we do not believe that the Bank has made the requisite "strong showing that the forum-selection clause should be set aside" under Texas law.

As noted above, the *Phoenix* Court recognized that there were several Texas Court of Appeals holdings which required a showing that the agreed upon forum also recognize the validity of forum selection clauses, but this requirement was no longer valid in light of more recent Texas Supreme Court decisions. One of the cases which applied this no longer valid requirement was *Accelerated Christian Education, Inc. v. Oracle Corp.*, 925 S.W.2d 66 (Tex. Ct. App. 1996). Although *Accelerated Christian* is not valid for that particular point, that case has been favorably cited for its discussion of "transaction participants." According to *Accelerated Christian*:

> In federal court, forum selection clauses have been applied to nonsignatories to a contract who are "transaction participants." *See, e.g., Brock*, 740 F. Supp. at 431; *Clinton v. Janger*, 583 F. Supp. 284,

> 290 (N.D. Ill. 1984). A valid forum selection clause applies to all transaction participants. *See Brock*, 740 F. Supp. at 430-31.…
>
> The parties cite no Texas cases that directly address the issue of whether a forum selection clause can apply to one who was not a signatory to the contract. Nor has our research revealed any Texas cases on point.
>
> We agree with the federal court that a valid forum selection clause governs all transaction participants, regardless of whether the participants were actual signatories to the contract. By transaction participant, we mean an employee of one of the contracting parties who is individually named by another contracting party in a suit arising out of the contract containing the forum selection clause. To hold otherwise would allow a nonsignatory employee, who was a transaction participant, to defeat his company's agreed-to forum by refusing to be bound by the employer's contract. This cannot be. We conclude the trial court may apply a valid forum selection clause to all transaction participants. To conclude otherwise would enable a party to bypass a valid forum selection clause by naming in its petition a closely-related party who was not a party to the contract. *See Lu*, 14 Cal. Rptr.2d at 908.…

Accelerated Christian, 925 S.W.2d at 75 (footnotes omitted). *See also Titan Indemnity Co. v. Hood*, 895 So. 2d 138, 148-49 (Miss. 2004)(adopting transaction participant theory advanced by *Accelerated Christian* as the "same standard" to "apply in the underlying case."); *Manetti-Farrow, Inc. v. Gucci America, Inc.*, 858 F.2d 509, 514 n.5 (9th Cir. 1988) ("'[A] a range of transaction participants, parties and non-parties, should benefit from and be subject to forum selection clauses'.… We agree with the district court that the alleged conduct of the non-parties is so closely related to the contractual relationship that the forum selection clause applies to all defendants.") (quoting *Clinton v. Janger*, 583 F. Supp. 284, 290 (N.D. Ill.1984)); *Ex parte Promoc Servs., Inc.*, 884 So. 2d 827, 834 (Ala. 2003).

We agree with the rationale of the above decisions and adopt the transaction participant theory with respect to the Bank's claims against Oakes and Ownby individually. Oakes and Ownby are employees "of one of the contracting parties who is individually named by another contracting party in a suit arising out of the contract containing the forum selection clause." *Accelerated Christian*, 925 S.W.2d at 75. Accordingly, the Bank cannot prevent enforcement of the forum selection clause by other parties to the Agreement by naming these two individuals as additional defendants.

Conclusion

The judgment of the Trial Court is affirmed, and this cause is remanded to the Trial Court for collection of the costs below. Costs on appeal are taxed to the Appellant, Sevier County Bank, and its surety.

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D. MICHAEL SWINEY, JUDGE